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Representative Kelly Breen
Chair, House Judiciary Committee
House Office Building,
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March 6, 2023

Dear Chairperson Breen and House Judiciary Committee Members,

My name is Elizabeth Pollard Hines. I was privileged to serve as a District Court judge in Ann Arbor for almost 28 years until I retired in November of 2020. I presided over criminal cases, including a nationally-recognized, specialized Domestic Violence Docket. For many years, I taught domestic violence law at Michigan Judicial Institute's New Judges' School. I am honored to continue serving on the Michigan Domestic and Sexual Violence Prevention and Treatment Board (MDSVPTB). I am grateful to Governor Whitmer for, in January, appointing me Chair. The Board has not yet had the opportunity to take a formal position on the important gun safety bills this Committee is considering. We plan to do so at our next meeting, March 10th. I welcome the opportunity to then give you the position of the MDSVPTB.

I write today about the proposed Red Flag Law, HB 4145, not as Board Chair, but based on my experience working with victims and defendants for decades. Only as context for my opinion, I note that I was an Assistant Prosecuting Attorney in Washtenaw County for 15 years before my election to the bench in 1992. I am also active with the American Judges Association (AJA) which is housed in the National Center for State Courts. I believe that AJA remains the largest national, independent organization of judges only in the country. I am Chair of the AJA Domestic Violence Committee. Last summer, the AJA passed a Resolution urging all states to adopt Red Flag Laws based on evidence that such laws save lives by reducing suicides and homicides.

My heart goes out to the victims, survivors, families and friends of the tragic shootings at MSU and Oxford and the too many others affected by gun violence every day. I commend you for actually doing something about it by taking action with the gun safety laws you are considering. Thank you.

I respectfully suggest you consider the following brief but important points to strengthen the proposed legislation:

First, as you know, ERPO hearings are civil in nature, not criminal; they are meant to prevent violence and protect people, not punish. Use of the term “Defendant” in the bill for the person who is the subject of the petition, while technically correct, typically connotes a criminal proceeding. The bill changes that term to “the restrained individual” once the person has been served with an ERPO. In my opinion, it is important to use civil justice terms of “**petitioner**” and “**respondent**” throughout the bill rather than “plaintiff”, “defendant”, and “restrained individual”. That would avoid having to use different terms for the same individual and having to know whether or not an Order was issued and served in order to know which term to use. “Petitioner” and “respondent” are terms used in other civil protective orders. “Petitioner” and “respondent” are used in Michigan’s PPO statutes, MCL 600.2950 and 600.2950a. The Michigan Court Rules that govern the process for obtaining a personal protection order against an adult similarly use “petitioner” and “respondent”. MCR 3.702 defines the terms:

- (2) “petition” refers to a pleading for commencing an independent action for personal protection and is not considered a motion as defined in MCR 2.119;
- (3) “petitioner” refers to the party seeking protection;
- (4) “respondent” refers to the party to be restrained;

Unlike many other civil cases, no summons is required. MCR 3.703(A). Red Flag Laws in other states use “petitioner” and “respondent” as well. I believe those terms would make HB 4145 clearer.

Second, to maximize safety, the bill should authorize removal of any “**ammunition**” as well as guns. All other states with Red Flag laws require the respondent to surrender firearms *and ammunition* upon service of an Extreme Risk Protection Order.

Third, Section 7 lists factors the court must consider before issuing an Order. I would not limit the court to only “use, attempted use, or threatened use” of “*physical force*”. (HB 4145, sec. 7(1)(a). I would add “or stalking behavior”. Stalking is too often a precursor to murder. Stalking may not involve “physical force”, but to someone threatened and stalked by a person with a gun, it can turn deadly.

HB 4145, sec. 7(1)(d), requires the court to consider a violation of any previous or existing ERPO. I would argue that the court should consider a violation of “any ‘no contact’ condition of bond, probation or parole” as well.

Sec. 7 (1)(f) mandates that the court consider any previous “convictions” of the “defendant” for any of the offenses listed then in the bill. To make it clear, I would specify that the court should also consider “*no contest* pleas and deferred or delayed adjudications” of the offenses listed in the bill, too. For e.g.: A person may plead guilty to Domestic Assault and be sentenced to probation under the domestic deferral statute, MCL 769.4a. That is not a “conviction.” I believe that a judge considering whether to issue an ERPO would want to know and should know if the subject of the petition entered a plea under a domestic violence deferral statute.

Fourth, the bill should clarify when and by what process the police may search for guns and ammunition. What if the police have an Order to serve but the Respondent is evading them?

Are the police supposed to walk away, leaving the weapons, or may they lawfully remove guns and ammunition from the premises? Language used in the Florida Red Flag Law passed with bipartisan support after the murders at Marjory Stoneman Douglas High School may be helpful. See Fla. Stat. § 790.401(7): SURRENDER OF FIREARMS AND AMMUNITION.

Fifth, if someone petitions in good faith to get an Extreme Risk Protection Order but the court denies the order for some reason, they should not fear criminal penalties. Of course, there should be a penalty for deliberate, false testimony. Similar to the Florida Red Flag Law, Fla. Stat. § 790.401(11)(a), criminal penalties should attach only if the person makes a false statement, under oath, *which he or she does not believe to be true*, regarding a material matter.

Florida reportedly has the most petitions for risk protection orders in the country. The Committee may want to consider several of their additional statutory provisions, including:

790.401(2)(c): “Such petition for a risk protection order does not require either party to be represented by an attorney.” and 790.401(2)(d): “Notwithstanding any other law, attorney fees may not be awarded in any proceeding under this section.” Another Florida provision that may be helpful in Michigan is 790.401(12) specifying that “This section does not affect the ability of a law enforcement officer to remove a firearm or ammunition or license to carry a concealed weapon or concealed firearm from any person or to conduct any search and seizure for firearms or ammunition pursuant to other lawful authority.”

Only a law enforcement officer or law enforcement agency may file a petition for a risk protection order in Florida. 790.401(2)(a). Florida law makes clear, in essence, that the statute does not impose any civil or criminal liability for acts or omissions related to obtaining a risk protection or reporting, declining to report, investigating, declining to investigate, filing, or declining to file a petition. 790.401(13). Should Michigan have some sort of protection for people who petition for an ERPO in good faith?

Interestingly, the Florida statute allows the judge at a risk protection order hearing to order a mental health or chemical dependency evaluation of the respondent, if appropriate (790.401(3)(f)):

(f) During the hearing, the court *must consider* whether a mental health evaluation or chemical dependency evaluation is appropriate and, if such determination is made, *may* order such evaluations, if appropriate. [emphasis added]

Since many petitions concern people who are actively suicidal, the authority to order mental health evaluations is helpful, according to the Hon. Carroll Kelly, who hears many such petitions in the Miami-Dade County Domestic Violence Court. Judge Kelly is a personal friend. The Florida legislature did not fund such mental health evaluations, but Judge Kelly said there is no problem if the respondent has insurance. If there is no insurance, they have worked with local public hospitals and others to have such evaluations done when possible. Judge Kelly holds

compliance review hearings to do her best to ensure people comply. Family members and respondents themselves have thanked her later for saving the respondent's life by getting the respondent into treatment.

Finally, Florida appears to have developed instructional and informational materials that may be helpful in Michigan if HB 4145 becomes law. It is a requirement of their statute. 790.401(14). Materials may include local community resources, including crisis intervention, mental health, substance abuse and other counseling. Instructions for petitioners are required to include pictures of types of firearms and ammunition that a petitioner may choose from to identify relevant firearms and ammunition without requiring specific or technical knowledge of firearms or ammunition.

Thank you for considering my views. I would be happy to follow up with Committee members or staff to address questions or further discuss any of these issues.

Respectfully submitted,

A handwritten signature in cursive script that reads "Elizabeth Pollard Hines". The ink is dark and the signature is written in a fluid, connected style.

Elizabeth Pollard Hines